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## Labor Law--Computation of Working Time Under Maximum Hour Law

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where such mistake becomes evident only through passage of time.<sup>8</sup> Had the insured made a better election, such as paid up or extended insurance, he would, under the statute,<sup>9</sup> have been entitled to payments under the prior policy, upon surrender of subsequent contract; here this could not be done because the cash-surrender election was a complete termination of the policy.<sup>10</sup>

The instant case seems to present some difficulty because of the sympathy one feels for those who suffer from what has turned out to be a bad bargain. Hard cases are quicksands of law. There will be less difficulty in seeing the correctness of the decision if the principles involved are applied to a different situation. If the insured, hopelessly disabled and practically certain to die in the near future, desired a lump sum rather than comparatively small monthly payments for the short span of life that was left him, the insurer would have to abide by this election; any refusal to make such payment would be a plain breach of the insurance contract.<sup>11</sup>

H. P. S.

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LABOR LAW — COMPUTATION OF WORKING TIME UNDER MAXIMUM HOUR LAWS — MINING INDUSTRIES. — The question of what constitutes hours worked in underground metal mines, within the meaning of section 7 of the Fair Labor Standards Act of 1938,<sup>1</sup> has been answered by two recent federal cases holding that the

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<sup>8</sup> *Chicago & N. W. Ry. v. Wilcox*, 116 Fed. 913, 915 (C. C. A. 8th, 1902); *Pacific Mut. Life Ins. Co. v. Jacob*, 87 F. (2d) 870 (C. C. A. 8th, 1937).

<sup>9</sup> *World War Veterans' Relief*, 38 U. S. C. A. § 518.

<sup>10</sup> But see *Denny v. United States*, 103 F. (2d) 960 (C. C. A. 7th, 1939). The case states by way of dicta that a veteran's converted policy was satisfied by its surrender for cash, but this did not prevent him from recovering on his original war risk insurance contract, and having his case submitted to the jury for determination, provided there was substantial evidence presented showing the required disability. *Tucker v. Equitable Life Assur. Soc.*, 174 La. 598, 141 So. 71 (1932). Insured's mailing his letter expressing decision to take surrender value of life policy, was held an election for cancellation preventing recovery on the policy, although check for surrender value was not received until after insured's death.

<sup>11</sup> *United States v. Garland*, 122 F. (2d) 118 (C. C. A. 4th, 1941). This example was suggested by Judge Dobie in the instant case, by way of dictum.

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<sup>1</sup> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce: . . . (3) for a workweek longer than forty hours after the expiration of the second year from such date [the effective date of the Act], unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half the regular rate at which he is employed." Fair Labor Standards Act of 1938, 29 U. S. C. A. c. 8, § 207.

time spent in traveling from the portal of the mine to the usual place of work in the mine and in returning therefrom to the portal constitutes hours worked,<sup>2</sup> so that the metal miner's workday begins when he enters the mine and lasts until he comes out, excluding time spent for meals. This is the "portal to portal" interpretation of hours worked in underground mines, as opposed to the "working face" interpretation, which holds that the hours worked include only the time spent at the usual place of work in the mine.<sup>3</sup>

Legal authority on this point is almost wholly statutory; in the only previous case, a state court held for the "working face" interpretation.<sup>4</sup> By statute, Arizona<sup>5</sup> and Utah<sup>6</sup> adhere to the "portal to portal" interpretation, while the Wyoming statute<sup>7</sup> expressly states the "working face" view. Under the Nevada statute,<sup>8</sup> hours worked are computed from the time of arrival at the working face until the return to the portal. Other states have statutes limiting the hours of work in mines,<sup>9</sup> but these are not explicit as to the method of computing the time and have not yet been interpreted. That the federal courts' adherence to the "portal to portal" interpretation will influence state courts in interpreting their laws is shown in the recent case of *Butte Miners' Union No. 1 v. Anaconda Copper Mining Co.*,<sup>10</sup> where the Montana Supreme Court felt constrained to follow the federal interpretation,<sup>11</sup> even though recognizing that the state legislature, over a long period of time, had been rejecting a bill specifically enacting the "portal to portal" interpretation.<sup>12</sup>

<sup>2</sup> *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 40 F. Supp. 4 (D. C. Ala. 1941); *Sunshine Mining Co. v. Carver*, 41 F. Supp. 60 (D. C. Idaho, 1941).

<sup>3</sup> UNITED STATES DEP'T OF LABOR, WAGE AND HOUR DIVISION, HOURS WORKED IN UNDERGROUND METAL MINING REP. (March 15, 1941).

<sup>4</sup> *Ex parte Martin*, 157 Cal. 59, 106 Pac. 238 (1909).

<sup>5</sup> ARIZ. CODE (1939) c. 56, § 115.

<sup>6</sup> UTAH REV. STATS. (Supp. 1939) Tit. 49, c. 3, § 2.

<sup>7</sup> WYO. REV. STAT. (1931) c. 63, §§ 106, 107.

<sup>8</sup> NEV. COMP. LAWS (Hillyer, 1929) § 10237.

<sup>9</sup> COLO. STAT. (1935) c. 97, § 101; N. DAK. COMP. LAWS (Supp. 1925) c. 38, § 3084a88; ORE. COMP. LAWS (1940) § 102-504; WASH. REV. STATS. (Remington, 1932) § 8794.

<sup>10</sup> 118 P. (2d) 148 (Mont. 1941); MONT. REV. CODE (1935) § 3071.

<sup>11</sup> "Since we have no power to overrule the interpretation of the federal statute by the federal executive and judicial branches or to impose a contrary interpretation upon them, our only alternative, in order to avoid a chaotic condition under our dual form of government, is to adopt a like interpretation of our own statutory and constitutional provisions, in the mutual interest of labor, industry, and the general public." *Butte Miners' Union No. 1 v. Anaconda Copper Mining Co.*, 118 P. (2d) 148, 153 (Mont. 1941).

<sup>12</sup> A bill enacting the "portal to portal" interpretation was rejected by the legislature at four different times from 1905 to 1939. *Id.* at p. 155.

Precedent for the "portal to portal" interpretation may be found by looking to the construction placed on the Federal Hours of Service Act,<sup>13</sup> which limits the time to be spent on duty by employees on interstate carriers to sixteen hours out of every twenty-four hours. In construing "on duty" for the purpose of applying this law, courts have not limited the employee's time on duty to actual traveling time, but have held that an employee is "on duty" when he reports, under orders, for preliminary work before the train leaves.<sup>14</sup> Interpretations of the workmen's compensation law furnish further analogy for the "portal to portal" theory, it being held that an injury to a miner while in the mine, although not actually at work, may be within the scope of the employment.<sup>15</sup>

There are no cases deciding what constitutes hours worked in coal mines. The bituminous coal operators and their employees, in their collective bargaining agreement, have accepted the "working face" interpretation.<sup>16</sup> The Wage and Hour Administrator, in answer to an inquiry concerning the bituminous coal industry, stated that, in applying the Fair Labor Standards Act, he will give weight to any reasonable standards of determining hours worked if these standards are the prevailing custom in an industry<sup>17</sup> and have been accepted in its collective bargaining agreements.<sup>18</sup> In view of the acceptance of the "working face" inter-

<sup>13</sup> Hours of Service of Employees, 45 U. S. C. A. c. 3, § 62.

<sup>14</sup> *San Pedro, L. A. & S. L. R. Co. v. United States*, 213 Fed. 326 (C. C. A. 8th, 1914); *United States v. Denver & R. G. R. Co.*, 197 Fed. 629 (D. C. N. Mex. 1912); *United States v. Illinois Cent. R. Co.*, 180 Fed. 630 (D. C. Iowa, 1910).

<sup>15</sup> *Montgomery v. State Compensation Comm'r*, 116 W. Va. 44, 178 S. E. 425 (1935); *Wirta v. North Butte Mining Co.*, 64 Mont. 279, 210 Pac. 332 (1922).

<sup>16</sup> "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis; . . . excepting that number of mine workers in each mine whose daily work includes the handling of mantrips and those who are required to remain on duty while men are entering and leaving the mine . . . . The following classes of mine workers are excepted from the foregoing provisions as to the maximum hours of work: all mine workers engaged in the transportation of men and coal shall work the additional time necessary to handle man-trips and all coal in transit and shall be paid the regular hourly rate for the first seven hours and time and one-half for all overtime. . . ." *APPALACHIAN COAL UNION AGREEMENT* (master agreement), June 19, 1941; same for 1939.

<sup>17</sup> It is not clear as to what would be regarded as establishing a custom. Would state statutes be regarded as establishing a custom?

<sup>18</sup> "Colonel Fleming announced that on the basis of an inquiry submitted by the bituminous coal mining industry submitted by the Wage and Hour Division in carrying out its enforcement duties in that industry will accord great weight to any reasonable standards for determining working time which represent the prevailing customs and practices in the particular industry and

pretation by the bituminous coal operators and their employees, with the recognition of this agreement by the wage and hour division in its administrative policy, it seems safe to assume that there is no controversy today on this point in West Virginia. Whether the point will have to be litigated in the future would seem to depend on future changes in existing employer-employee relations in the coal industry.

E. I. E.

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**LIBEL — LIBEL *Per Se* — FAIR COMMENT — ATTRIBUTING ANTI-SEMITISM TO CONGRESSMAN.** — *P* was a representative in Congress and *D* printed in a newspaper words in the nature of an editorial to the effect that Father *C* was waging a fight to prevent the appointment of a Jewish judge and that the appointment was violently opposed by *P*, who was, according to the article, "known as the chief congressional spokesman of Father *C*." *D* furthermore said that the basis of the opposition of *P* to the appointment was that the proposed appointee was a Jew, and one not born in the United States. The article also stated that *P* had called a caucus of Ohio representatives to protest against the appointment. An order granting *D*'s motion to dismiss the declaration for libel in the absence of an allegation of special damages was reversed. *Held*, that the statements are libelous *per se* and therefore no allegation of special damages is necessary. *Sweeney v. Schenectady Union Publishing Co.*<sup>1</sup>

Unless spoken words fall into one of these categories they are not actionable without proof of special damages: (1) words charging certain crimes, (2) words accusing one of having certain communicable diseases, or (3) words tending to harm a person in his trade, business, profession or office.<sup>2</sup> Any libel is actionable

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are supported by a long history of bona fide collective bargaining agreements. In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that practice of computing time on a "face to face" basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term "face to face" to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening . . ." UNITED STATES DEP'T OF LABOR, WAGE AND HOUR DIVISION, Release R-928 (July 27, 1940).

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<sup>1</sup> 122 F. (2d) 288 (C. C. A. 2d, 1941), rehearing denied, Aug. 15, 1941.

<sup>2</sup> HARPER, TORTS (1933) § 238.